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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANIEL B., a Minor, etc., Plaintiff and Appellant, v. COUNTY OF SAN DIEGO et al., Defendants and Respondents.	D068152 (Super. Ct. No. 37-2013-00044247-CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Niddrie | Addams | Fuller and David A. Niddrie; Law Office of Gary A. Sernaker and Gary A. Sernaker for Plaintiff and Appellant.

Thomas E. Montgomery, County Counsel, and Erica R. Cortez, Deputy County Counsel, for Defendants and Respondents.

I.

INTRODUCTION

Daniel B. appeals from a judgment entered in favor of defendants the County of San Diego and Anna Garcia[1] (jointly "the County") after the trial court granted the County's motion for summary judgment.

Daniel sued the County after he was severely abused by maternal relatives in whose care he was placed by the County after he was removed from his parents' care.

As Daniel acknowledges, a public entity's liability exists only where permitted by statute. The general rule is that a public entity may not be held liable for its actions or inactions absent a statutory exception. (See Gov. Code, § 815 ["Except as otherwise provided by statute: [¶] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."].) One exception to the general rule against public entity liability exists where a mandatory duty is imposed by enactment on a public entity and the public entity breaches that mandatory duty. (Gov. Code, § 815.6.)

On appeal, Daniel asserts that there exist certain mandatory duties that are imposed on the County, and that the County breached those mandatory duties, making the County liable for these breaches. Specifically, Daniel contends that there remain triable issues of fact with respect to whether the County met its duties to (1) ensure that

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1 Garcia is a social worker employed by the County of San Diego. Garcia and the County of San Diego were not separately represented in the trial court or in this court, and they have filed a single brief on appeal, establishing that their interests are aligned.

Daniel had medical and dental examinations every six months; (2) conduct unannounced visits in order to attempt to mitigate the risk of physical abuse and neglect; (3) ensure that he attended school; and (4) properly investigate and/or report suspected child abuse.

We conclude that the duties that Daniel raises on appeal were not identified in the operative complaint to which the County's motion for summary judgment was directed, and as to which the trial court granted summary judgment. Rather, these alleged duties were raised only in opposition to the County's motion for summary judgment and in a proposed third amended complaint that was rejected for filing. As a result, Daniel has demonstrated no basis for relief on appeal. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

Daniel was removed from his parents' custody in May 2009, when he was not yet six years old. Daniel was not physically or developmentally lagging behind his peers at that time.

The County of San Diego sought to place Daniel with his maternal uncle, Leon, and his wife Terri. A social worker completed an investigation and assessment of Terri and Leon's home as a placement option for Daniel. A supervisor reviewed the social worker's investigative findings and approved Terri and Leon's home for placement. Daniel was placed in Terri and Leon's home on May 20, 2009.

On September 9, 2009, the juvenile court sustained the County's petition, declared Daniel a dependent, and approved the County's placement of Daniel in Terri and Leon's home.

A week later, on September 16, 2009, an unrelated infant died while in Terri's care, apparently as a result of sudden infant death syndrome.[2] The County received a referral concerning the infant's death. A social worker investigated the referral by speaking with San Diego Police Detective Corrine Hart, as well as with Daniel. The social worker closed the referral as unfounded based on the information she gleaned regarding the incident.

From May 2010 through April 2011, social workers recertified Terri and Leon's home for placement twice.

On June 24, 2011, the juvenile court terminated Daniel's biological parents' parental rights and designated Terri and Leon as Daniel's prospective adoptive parents. Prior to the court's order, a social worker had completed an adoptive home study of Terri and Leon's home. The home study included a physical inspection of the home, a visit with Daniel in the home, child welfare and criminal background checks of Terri and Leon, a review of reference letters, and a psychosocial inventory evaluation of Terri and Leon.

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2 Daniel alleged in the trial court that Terri ran a daycare business, which would explain why there were unrelated children in Terri's care.

Terri and Leon signed adoptive placement papers with respect to Daniel on January 12, 2012. Upon the signing of the adoptive placement papers, the County was not required to conduct further recertification of the home for foster care placement.

Approximately six months later, on May 6, 2012, Daniel was removed from Terri and Leon's home after a relative became aware that Daniel was handcuffed to his bed and reported this to the police. After Daniel was removed from the home, he disclosed that Terri and Leon had abused him during his placement with them. The abuse included denying him food, handcuffing him and, at least with respect to Terri, hitting him and committing other forms of physical abuse. Daniel explained that he never told a social worker about the abuse because he was "scared that Terri would hurt him." Daniel suffered multiple injuries as a result of the abuse. He also was severely malnourished, his bones showed evidence of demineralization, and his skeleton was underdeveloped. Not surprisingly, Daniel also suffered significant psychological trauma.

During the time that Daniel lived with Terri and Leon, there were multiple referrals to the County regarding concerns over his care. For example, on April 26, 2011, someone called the County's child abuse hotline (Hotline) and alleged that Leon and Terri were neglecting Daniel and that they treated him differently from the way they treated other children living in the home. The person provided details about differential treatment that had been observed in the home, with Daniel often being "ostracized and mistreated" while "preferential treatment" was given to other children. Social worker Leah Stuever investigated the report and, after speaking with Daniel, Leon, and Terri,

discussing the case with a supervisor, and conducting a risk assessment, concluded that the allegation was unfounded.

A second Hotline referral came in on October 18, 2011. The reporter, who had observed Daniel at school, alleged that Daniel "appeared to be hungry" and was "very thin." After the reporter spoke with Terri about her concerns regarding Daniel, Terri withdrew Daniel from school and informed the school that she would be home schooling Daniel. In response to this referral, social worker Richard Russel spoke with Daniel, Leon, and Terri, as well as with Daniel's assigned case worker. Russell also reviewed the case file, conducted a risk assessment, and consulted with a supervisor, before determining that the neglect allegations were unfounded.

A third report was made on March 20, 2012. This report was made by social worker Gina Herbert after she arrived for a scheduled visit to the home and found Daniel with a bruise on his left cheekbone and appearing emaciated and malnourished. Social worker Stuever investigated the report. She spoke with Daniel, Terri, and Leon, as well as with social worker Herbert. Daniel denied that any abuse had occurred and stated that he felt he was in a safe environment. Stuever accompanied Daniel the following day when he was examined by a doctor at Rady Children's Hospital. The doctor did not detect signs of abuse, but diagnosed Daniel as having impacted bowels. Based on all of this, as well as a risk assessment, Stuever concluded that the abuse and neglect allegations were unfounded.

The abuse was discovered and reported by another relative and Daniel was removed from Terri and Leon's home less than two months after Herbert's referral.

B. *Procedural background*

In April 2013, Daniel, through his guardian ad litem, filed this action against the County, the County's employees Nick Macchione, Lauren Jankowski, Amy Donarico, and Yolanda Thomas, as well as Leon, Terri, and Terri's mother, who owned the house where Daniel was living while he was abused. Daniel asserted claims for negligence, false imprisonment, and intentional infliction of emotional distress.

Later that year, Daniel amended his complaint, adding social worker Anna Garcia as a defendant, and dismissing Terri's mother, as well as Machhione, Jankowski, Donarico, and Thomas from the action. The first amended complaint also added claims for civil rights violations pursuant to Civil Code sections 51 and 52. Although the record does not disclose what occurred with respect to the first amended complaint, the County asserts in briefing on appeal that the trial court sustained the County's demurrer to the first amended complaint in March 2014.

The following month, April 2014, Daniel filed a second amended complaint. In the second amended complaint, Daniel asserted that the County had breached four mandatory duties owed to him, such that the County was liable for damages pursuant to Government Code section 815.6 (Section 815.6). Specifically, Daniel alleged that the County had failed to protect Daniel's inalienable rights pursuant to the California Constitution, had failed to visit Daniel at least once every month as required by statute and regulation, had failed to investigate and report suspected child abuse and/or neglect pursuant to Penal Code section 11164, and failed to perform an assessment of Leon and Terri's home as required by statute. Daniel further alleged that social worker Garcia had

been negligent in placing and supervising Daniel in his abusers' home, in failing to investigate complaints of abuse, and in failing to determine that Daniel suffered from malnutrition as a result of being starved by Leon and Terri.

The County filed a motion for summary judgment directed to the second amended complaint, asserting that it was entitled to judgment as a matter of law on Daniel's causes of action because (1) the "mandatory duties" that Daniel had identified were not actual mandatory duties, (2) there had been no breaches of other identified mandatory duties, and (3) the negligence claimed as to the County's employees was based on discretionary decisionmaking on their parts, such that the employees were immune for those actions.

In his written opposition to the County's motion for summary judgment, Daniel argued that the County had breached a number of other alleged mandatory duties owed to Daniel that had not been raised in the second amended complaint. For example, Daniel asserted that the County failed to have Daniel undergo medical and dental examinations every six months, failed to perform unannounced monthly visits, and failed to determine whether Daniel's educational needs were being met after Terri removed him from public school in order to homeschool him. Daniel also presented a list of at least 13 regulations that he contended imposed mandatory duties on the County.

In reply briefing, the County objected to Daniel raising newly identified mandatory duties in his opposition to the County's motion for summary judgment—obligations that were not set forth in the second amended complaint. However, the County also attempted to address these newly raised theories on their merits, as well.

Although the record does not contain a tentative ruling issued by the court prior to the hearing on the County's motion for summary judgment, it is clear from statements made at the hearing on the motion that the court had issued a tentative ruling in favor of the County prior to the hearing.

On February 27, 2015, at the hearing on the motion for summary judgment and in the face of a tentative ruling against him, Daniel requested permission to amend his cause of action for breach of mandatory duty. The following colloquy took place:

> "The Court: And I guess what I'm asking you is what are the—in this case, in the Daniel B. case, specifically, without giving a closing argument to the jury, what are the mandatory duties that were breached? And if you want to amend, I'll let you amend.
>
> "Mr. Sernaker [counsel for Daniel]: That's what I want to do. And I want to amend to allege the regulations that listed the mandatory duties on pages 8 and 9 of my opposition.
>
> "The Court: And you haven't done that. You're going to add to the—
>
> "Mr. Sernaker: Right.
>
> "The Court: Right what?
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> "Mr. Sernaker: I'm going to add to the DSS regulations and additional statutes that I noted in the reporting issue requiring social workers to report suspicions of alleged allegations of abuse and neglect, and that's what I would like to do.
>
> "Ms. Rae [counsel for the County]: If I may, Your Honor.
>
> "The Court: Okay.
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> "Ms. Rae: If I may? In his opposition, he outlined all these additional mandatory duties. In my reply—
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> "The Court: I understand that, but—

"Ms. Rae: —I addressed that.

"The Court: —all we have is the first [*sic*] amended complaint.

"Ms. Rae: I understand that, but I felt like the court had said in its tentative—

"The Court: I agree with you.

"Ms. Rae: —that you addressed them, so I'm not sure what amending would do.

"The Court: I agree, but I want to give him the opportunity to—

"Ms. Rae: But would the evidence that he's submitting or his argument be any different? And I don't think it would be.

"The Court: I understand, and I think—I think I know what I'm going to get, but I'm just trying to do this in an efficient way. [¶] I suppose that the most efficient way to do it would be to take this under submission and allow Mr. Sernaker to amend the second amended complaint. I don't want a whole new pleading.

"Mr. Sernaker: No, that's—

"The Court: To set forth specifically, specifically, what mandatory duty was breached.

"Mr. Sernaker: Right.

"The Court: That isn't in the first amended—that isn't in the second amended complaint.

"Mr. Sernaker: Right. That's what I want to do.

"The Court: And how many new mandatory duties are you going to allege?

"Mr. Sernaker: Well, I'm going to go through the ones that I listed here, and then I'm going to allege the specific Penal Code sections that require reporting of suspicions of abuse and neglect, and those are what I intend to do.

"The Court: But you already did that.

"Mr. Sernaker: Well, the court rejected the Penal Code section that I cited as not an issue in a mandatory duty, so I want to provide the mandatory duty for the Penal Code section and the corresponding DSS regulation which mandates the social worker to making a—

"The Court: So you're going to file an amendment to the second amended complaint?

"Mr. Sernaker: Yes, I'll file—I'll just amend the first cause of action that deals with the breach of mandatory duties.

"The Court: Okay."

The court and the attorneys continued to discuss a variety of regulations and the Penal Code provision, and whether the statute and regulation imposed a mandatory duty on the County to report suspected child abuse. The conversation never returned to the proposed amending of the operative pleading. At the conclusion of the hearing, the court took the matter under submission.

A few days later, on March 2, 2015, the trial court issued its order granting summary judgment in favor of the County and ordering that the action be dismissed and judgment entered in favor of the County. The court's order addresses the constitutional, statutory, and regulatory provisions that Daniel identified in the second amended complaint as constituting mandatory duties imposed on the County. The court's order then states, "In opposition, plaintiff cites Penal Code §§ 11166(a)(1), 11166(j), as well as Regulations 31-501.1," and notes, "[n]one of these enactments were included in the Second Amended Complaint. Plaintiff has not sought leave to amend." The trial court went on to state that even with respect to these newly cited enactments, "plaintiff has not

demonstrated a mandatory duty or a triable issue of fact," ostensibly rejecting these alternative theories on their merits, as well.

The trial court's "Register of Actions Notice" indicates that on March 4, 2015, Daniel attempted to file a third amended complaint and that the proposed pleading was rejected that same day.[3]

Approximately a month later, on April 13, 2015, the trial court entered a judgment in favor of the County.

Daniel filed a timely notice of appeal.

III.

DISCUSSION

We begin our discussion with an acknowledgment of the horrific abuses that Daniel suffered at the hands of the individuals to whom the County entrusted his care. There can be no question that the inhumane treatment of an innocent and helpless little boy is precisely the type of treatment that the state intends to prevent when it removes a child from his or her parents and assumes responsibility for that child. By placing Daniel in a home where he endured such terrible treatment, the system clearly failed Daniel.

However, the question before us does not involve the extent to which Daniel suffered or whether the County or its employees could have done more to ensure that he did not suffer in this way. Rather, the question we must resolve is, essentially, whether

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[3] A copy of the proposed third amended complaint was included in the appellant's appendix. It bears a date and time stamp of March 2, 2015, but does not bear a file stamp indicating that it was accepted and filed in the superior court.

our system of laws permits Daniel to recover in tort from a governmental entity under the circumstances of this case. Governmental tort liability is a creature of statute; liability lies solely where the Legislature had seen fit to permit it. Thus, even though one may feel a great deal of sympathy for Daniel, what occurred in this case does not necessarily equate to the existence of a viable legal claim by Daniel against the County. Similarly, sympathy would not permit this court to ignore the significant procedural shortcomings of an appeal. As we explain below, given the manner in which this case was litigated in the trial court, we must conclude that the trial court properly entered summary judgment in favor of the County.

A. *Summary judgment standards*

Summary judgment is appropriate when all of the papers submitted show that there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant may move for summary judgment if it is contended that the action has no merit. (Code Civ. Proc., § 437c, subd. (a)(1).) A defendant moving for summary judgment has the initial burden of showing that a cause of action is without merit. A defendant meets that burden by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense thereto. (*Id.*, subd. (p)(2).) If

the defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (*Ibid.*; *Aguilar, supra*, 25 Cal.4th at p. 849.)

On review from a trial court's granting of a motion for summary judgment, " 'we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250 (*Conroy*).) In other words, on appeal, "our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493, 494 (*Hutton*).)

The pleadings play a crucial role with respect to a party's motion for summary judgment. (See *Conroy, supra*, 45 Cal.4th at p. 1254.) " ' "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues . . . " ' and to frame 'the outer measure of materiality in a summary judgment proceeding.' [Citation.] As our Supreme Court has explained it: 'The materiality of a disputed fact is measured by the pleadings [citations], which "set the boundaries of the issues to be resolved at summary judgment." ' " (*Hutton, supra*, 213 Cal.App.4th at p. 493.)

A defendant moving for summary judgment need only negate a plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not "refute liability on some theoretical possibility not included in the pleadings." (*Hutton*, *supra*, 213 Cal.App.4th at p. 493.) In addition, " ' " '[t]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.' " ' " (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 333.) An opposing party's separate statement is not a substitute for amendment of the complaint. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201, fn. 5, 1202.) Similarly, " ' "[d]eclarations in opposition to a motion for summary judgment 'are no substitute for amended pleadings.' " ' " (*Conroy, supra*, 45 Cal.4th at p. 1254.)

B. *Analysis*

Daniel contends that the trial court erred in granting the County's motion for summary judgment because "[t]riable issues of fact exist concerning respondents' liability in this case." (Formatting omitted.) Specifically, Daniel asserts that there are regulations at issue in this case that impose mandatory duties on the County that the County breached and for which liability may therefore be imposed.

1. *Governmental liability*

"In California, all government tort liability must be based on statute." (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457.) "Except as otherwise provided by statute: [¶] (a) [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."

(Gov. Code § 815, subd. (a); see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.) Daniel relies on Section 815.6, which provides a statutory exception to the general rule of public entity immunity, as the basis for liability against the County. Section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."[4]

"Government Code section 815.6 has three elements that must be satisfied to impose public entity liability: (1) a mandatory duty was imposed on the public entity by an enactment; (2) the enactment was designed to protect against the particular kind of injury allegedly suffered; and (3) the breach of the mandatory statutory duty proximately

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4 The second amended complaint also alleged that the County was negligent under Government Code section 815.2 (Section 815.2), which provides: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Generally, a public employee is "liable for injury caused by his act or omission to the same extent as a private person." (Gov. Code, § 820, subd. (a).) However, as relevant here, "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.)

Thus, Daniel attempted to impose liability on the County pursuant to two statutes: (1) Section 815.6, which generally provides for direct liability of a government entity for failure to discharge a mandatory duty, and (2) Section 815.2, subdivision (a), which provides for the entity's derivative liability, under certain circumstances, for the acts or omissions of employees. Daniel does not address Section 815.2 on appeal.

caused the injury." (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 179.) "Even when a duty exists, California has enacted specific immunity statutes that, if applicable, prevail over liability provisions. [Citation.] The first question always is whether there is liability for breach of a mandatory duty. [Citation.] If there is no liability, the issue of immunity never arises." (*Ibid.*)

Application of Section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 907, 910 (*Morris*).) Further, it is not sufficient that the public entity or officer have been under an obligation to perform a function if that function itself involves the exercise of discretion. (*Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 631-633.) "An enactment creates a mandatory duty if it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." (*County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639.)

"Whether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function, is a question of statutory interpretation for the courts." (*Creason*, *supra*, 18 Cal.4th at p. 631.) The enactment's language "is, of course, a most important guide in determining legislative intent, [but] there are unquestionably instances in which other factors will indicate that apparent

obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion." (*Morris, supra*, 18 Cal.3d at pp. 910, fn. 6, 911.)

When considering whether a mandatory duty has been imposed on the public entity by an enactment, we look to the Government Code, which provides a very specific definition of "enactment." Government Code section 810.6 defines an " '[e]nactment' " as "a constitutional provision, statute, charter provision, ordinance or regulation." " 'This definition is intended to refer to all measures of a formal legislative or quasi-legislative nature.' [Citation.] The term 'regulation,' as used in Government Code section 810.6 means 'a rule, regulation, order or standard, having the force of law, adopted . . . as a regulation by an agency of the state pursuant to the Administrative Procedure Act . . . .' " (*Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 982 (*Wilson*).) The policies and procedures found in the California Department of Social Services (DSS) Manual of Policies and Procedures, enacted pursuant to Welfare and Institutions Code section 16501, may qualify as enactments which create a public entity duty. (See *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 134, 142 [breach of mandatory duty found to exist where social worker visited dependent child in placement only three times in 10 months, rather than on monthly basis as required by DSS Manual of Policies and Procedures regulation 30-342[5] (predecessor of reg. 31-320), no investigation was

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5 All further references to regulations are to the DSS Manual of Policies and Procedures unless otherwise indicated.

The DSS Manual of Policies and Procedures may be accessed online at <http://www.cdss.ca.gov/ord/PG309.htm>.

conducted of allegations of physical abuse, and child was subsequently severely injured by caregiver].)

2. *Daniel has not demonstrated reversible error in the granting of summary judgment in favor of the County because the mandatory duties that Daniel discusses on appeal were not alleged in the operative pleading; the operative pleading defines the scope of the motion for summary judgment*

a. *The mandatory duties identified on appeal*

In briefing on appeal, Daniel contends that there are regulations that impose certain mandatory duties on the County and its employees with respect to its handling of his case. Daniel identifies these duties as "Semiannual medical/dental examinations," "unannounced home visits," "Daniel's educational needs," and "Investigations/Reports." Although Daniel's arguments regarding these "mandatory duties" are somewhat complex and, at times, are stated in vague or broad terms, we will attempt to summarize what we understand to be the specific "mandatory duties" he is now alleging that the County has breached.

i. *Medical and dental examinations*

First, with respect to the mandatory duty related to semiannual medical and/or dental examinations, Daniel contends that a number of regulations, when considered together with Daniel's individual case plan,[6] required that the County's social workers

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[6] According to regulation 31-002(c)(3), a " '[c]ase plan' " is "a written document which is developed based upon an assessment of the circumstances which required child welfare services intervention; and in which the social worker identifies a case plan goal, the objectives to be achieved, the specific services to be provided, and case management activities to be performed." The Legislature has declared that a case plan is to be

"*ensure* [that] Daniel received medical and dental care while in the foster care system by arranging examinations by his physician/dentist every six months (as required by Daniel's court-ordered Case Plan [citation])." Among the regulations that Daniel identifies in his briefing on appeal are the following: regulation 31-206.36, regulation 31-301.11, regulation 31-405, regulation 31-405(n), regulation 31-330.1, regulation 31-335.13, regulation 31-310.12, and regulation 31-310.13.[7] According to Daniel, the goals

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considered "the foundation and central unifying tool in [providing] child welfare services." (Welf. & Inst. Code, § 16501.1, subd. (a)(1).)

[7] Regulation 31-206.3.36, which Daniel identifies as 31.206.36, requires a social worker to document in a child's case plan:

> "A plan which will ensure that the child will receive medical and dental care which places attention on preventive health service through the Child Health and Disability Prevention (CHDP) program, or equivalent preventive health services in accordance with the CHDP program's schedule for periodic health assessment."

Regulation 31-301.1.11, which Daniel identifies as regulation 31-301.11, states:

> "The social worker shall ensure that the provision of all services is consistent with the case plan goals specified in the child's case plan."

Regulation 31-405.1.22 (formerly regulation 31-405.1(*l*), and identified by Daniel as 31-405) states that, with respect to "arranging for a child's placement," a social worker shall "[m]onitor the child's physical and emotional condition, and take necessary actions to safeguard the child's growth and development while in placement."

Regulation 31-405.1.24 (formerly regulation 31-405.1(n), and identified by Daniel as 31-405(n)) provides that with respect to "arranging for a child's placement," a social worker shall "[e]nsure that the child receives medical and dental care which places attention on preventive health services through the Child Health and Disability Prevention (CHDP) program, or equivalent preventive health services in accordance with the CHDP program's schedule for periodic health assessment."

Regulation 31-330.1, provides: "The social worker shall arrange for contact, as determined in the child's case plan, for each out-of-home care provider."

Regulation 31-335.1.13, which Daniel identifies as regulation 31-335.13, provides that a social worker "shall have contact with other professionals working with the child, parents/guardians . . . and out-of-home care provider including, but not limited to," the child's "[p]hysician."

identified in these regulations, when considered together and in relation to Daniel's case plan, which provided that Daniel was to receive medical and dental care every six months, imposed on Daniel's social workers a mandatory duty to "*ensure*" that Daniel received this care every six months, to "monitor" Daniel's physical and emotional condition, and to "take all necessary actions to safeguard Daniel's growth and development while in placement." Daniel contends that the County failed to ensure that he received medical and dental care every six months, and that the County failed to arrange for these doctor visits, which he contends the County was obligated to do pursuant to his case plan and the regulations he cites.

ii. *Unannounced home visits*

Daniel also argues that the County had a mandatory duty "to conduct monthly 'announced' and 'unannounced' visits to Daniel's home, school or other locations." Daniel argues that both announced and unannounced visits became a mandatory duty when Daniel's case plan was updated to include this requirement. Daniel contends that the County failed to conduct any successful unannounced visits to his home, school, or elsewhere.

Regulations 31-310.1.12 and 31-310.1.13, which Daniel identifies as regulations 31-310.12 and 31-310.13, require that a social worker, "[i]n providing or arranging for the provision of services identified in the case plan, . . . shall: [¶] . . . [¶] .12 Monitor the child's physical and emotional condition. [¶] .13 When a child's family is being provided services in order to maintain the child in the home, take action as necessary to ensure that the child's protective needs continue to be met."

iii. *Daniel's educational needs*

Daniel argues that his "Case Plan required that he '[a]ttend school regularly.' " Although Daniel appears to be asserting that the County's "mandatory duty" in this regard was to ensure that he attended school regularly, as required by his individual case plan, Daniel also relies on various regulations and at least one statute to support his contention that the County had a duty to ensure that he attended school. For example, Daniel identifies regulation 31-330.111, regulations 31-320.52 and 31-320.59, regulation 31-405.1(o), and Welfare and Institutions Code section 16001.9, subdivision (a).[8] Again, based on these regulations and the terms of his case plan, Daniel argues that the mandatory duties the County breached were to ensure that he attended school and to "monitor Daniel's educational needs and development."

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8 Regulation 31-330.1.11.111, which Daniel identifies as regulation 31-330.111, provides that "[t]he purpose of social worker/out-of-home care provider contact is to" permit the social worker to "[m]onitor and assess the quality of care provided including the location and safety of the child and the ability of the out of home care provider to meet the child's basic and special needs, if any (e.g.[,] health and educational needs)."

Regulations 31-320.5.52 and 31-320.5.59, which Daniel identifies as regulations 31-320.52 and 31-320.59, provide that the purpose of a social worker's contact with the child "is to assess the safety and well being of the child," and to "[m]onitor the child's physical, emotional, social, and educational development" (reg. 31-320.5.52) and "[e]valuate and assess the child's educational needs and progress and the potential need for special educational services such as an Individual Education Plan" (reg. 31-320.5.59).

Regulation 31-405.1.25 (formerly regulation 31-405.1(o) as identified by Daniel) provides that, in arranging for a child's placement, the social worker is to "[m]ake certain that arrangements for, and monitoring of, the child's educational progress while in placement are undertaken."

Welfare and Institutions Code section 16001.9, subd. (a) provides a list of "rights" to which children in the foster care system in the state are entitled.

iv. *Investigations/reports*

With respect to this set of alleged duties, Daniel cites to another lengthy list of regulations and statutes that he contends form a "duty" amalgam related to the investigation and reporting of suspected abuse. For example, Daniel mentions regulation 31-015.22, regulation 31-084.1, regulation 31-125.1, regulation 31-125.2, regulation 31-120, regulation 31-501.1, and Penal Code section 11166, subdivision (a).[9] Based on

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[9] Regulation 31-015.2.22, which Daniel identifies as regulation 31-015.22, provides that the emergency response telephone number is to be publicized, in part, by "[d]istribution to schools, physicians, hospitals, and other entities likely to observe abused, neglected, and exploited children."

Regulation 31-084.1 provides that "[t]he county shall report a referral as an emergency response referral when the referral alleges child abuse, neglect, or exploitation as defined in Penal Code Section 11165 et seq."

Regulation 31-120.1, which Daniel identifies as regulation 31-120, provides in relevant part that a "social worker shall conduct an in-person investigation of the allegation of abuse, neglect, or exploitation within 10 calendar days after receipt of a referral" under certain circumstances that indicate that an immediate in-person investigation is not necessary.

Regulation 31-125.1 requires that "[t]he social worker initially investigating a referral shall determine the potential for or the existence of any condition[(s)] which places the child, or any other child in the family or household, at risk and in need of services and which would cause the child to be a person described by Welfare and Institutions Code Section[] 300(a) through (j)."

Regulation 31-125.2 requires that "[t]he social worker investigating the referral shall have in-person contact with all of the children alleged to be abused, neglected or exploited, and at least one adult who has information regarding the allegations."

Regulation 31-501.1 provides that "[t]he county shall report by telephone, fax or electronic submission every known or suspected instance of child abuse and/or neglect as defined in Penal Code Section 11165.6, to law enforcement departments and the District Attorney's Office as specified in Penal Code Section 11166(j).

Penal Code section 11166, subdivision (a) provides: "Except as provided in subdivision (d), and in Section 11166.05, a mandated reporter shall make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the

these referenced regulations and Penal Code section, Daniel contends that the County "had a mandatory duty to properly and adequately investigate the referrals it received about Daniel's extreme hunger and malnourished appearance."

b. *The purported mandatory duties identified on appeal are not those identified in the operative pleading*

There is a significant problem with respect to Daniel's contentions on appeal regarding the alleged "mandatory duties" imposed on the County by enactment, the breach of which, he asserts, permits a finding of liability against the County: the second amended complaint—i.e., the operative pleading—does not allege that the County or its employees breached any of the "mandatory duties" arising from the enactments that Daniel identifies as the basis for the County's liability *on appeal*.

For example, our review of the second amended complaint demonstrates that Daniel identified only the following constitutional provisions, statutes and/or regulations as establishing "mandatory duties," the breach of which formed the basis for his claims of liability against the County defendants: (1) "31-320 ('Regulations')"; (2) Article 1, Section 1 of the California Constitution"; (3) "Article 1, Section 7(a) of the California Constitution"; (4) "The California regulations in the California Child Welfare Services manual 31-320.61"; (5) "Child's Welfare Service manual 31-320.5"; (6) "Penal Code Section 11164"; and (7)"Welfare and Institutions Code Section 16501.1." The second

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victim of child abuse or neglect. The mandated reporter shall make an initial report by telephone to the agency immediately or as soon as is practicably possible, and shall prepare and send, fax, or electronically transmit a written followup report within 36 hours of receiving the information concerning the incident. The mandated reporter may include with the report any nonprivileged documentary evidence the mandated reporter possesses relating to the incident."

amended complaint neither refers to nor cites *any* of the enactments (i.e., regulations or statutes) on which Daniel bases his appellate arguments. Thus, on appeal, Daniel identifies enactments different from the ones identified in the second amended complaint to support his claim that the County breached certain mandatory duties, and he does not challenge the trial court's rulings as to the enactments that were pled in the second amended complaint.

In his briefing on appeal, Daniel appears to acknowledge that his second amended complaint fails to allege the very mandatory duties on which he relies in making his appellate case. Indeed, he admits in his briefing on appeal that in the trial court, in reply to his opposition to the County's motion for summary judgment, the County "noted, among other things, that not all of the statutes and regulations relied on by Daniel were specified in his second amended complaint." Further, Daniel acknowledges that it was only at the hearing on the motion, *after* the parties had fully briefed the motion and the trial court had issued its tentative ruling on the matter, that he sought to amend the second amended complaint that was the subject of the motion for summary judgment: "*At the hearing on the motion*, Daniel requested permission to file a Third Amended Complaint specifying the enactments giving rise to the 'mandatory duties' breached by Respondents in this case." (Italics added.)

Nevertheless, in his briefing on appeal, Daniel asserts that the trial court "allowed the filing of the [third] amended complaint." At another point, however, he states, "[a] Third Amended Complaint *was presented for filing* on the following business day, March

2, 2015." (Italics added.)[10] Later, in a footnote in his opening brief on appeal, Daniel admits the following: "As noted above, Daniel alleged the County breached numerous mandatory duties. Some of these duties were not alleged in Daniel's Second Amended Complaint; but were discussed at the hearing on Respondent's summary judgment motion; all were considered by the trial court in its ruling. [Citation.] These duties have also been incorporated into Daniel's court-sanctioned Third Amended Complaint." Indeed, included in the appellant's appendix is a copy of a third amended complaint with a date stamp of "Mar 2 '15 PM 3:16," but no superior court file stamp on it.

In its own briefing on appeal, the County states the following with respect to a third amended complaint: "At the hearing on Respondents' motion for summary judgment, Daniel requested permission to amend his breach of mandatory duty cause of action. [Citation.] The trial court allowed the amendment, which was filed on March 2, 2015." However, later in its briefing, the County refers to Daniel's second amended complaint, and mentions that during oral argument on the summary judgment motion Daniel identified "additional 'mandatory' duties that he claimed were imposed by" the regulations.[11] Further, with respect to some of Daniel's contentions on appeal, the County asserts that Daniel failed to plead the existence of certain mandatory duties, and their breach, in the trial court.

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10 Notably, Daniel did not state that a third amended complaint was actually filed.

11 The County is only partially correct in this, since Daniel also raised "additional 'mandatory' duties" imposed by the regulations in his briefing in opposition to the County's motion for summary judgment.

Because the parties referred in their briefing on appeal to the filing of a third amended complaint when the order effectively ending the case was the court's granting of the County's "Motion for Summary Judgment, or in the Alternative, Summary Adjudication to Plaintiff's *Second Amended Complaint*" (italics added), we requested that the parties provide supplemental letter briefs regarding whether a third amended complaint had been filed and was pending in the trial court, despite the entry of judgment in favor of the County on the second amended complaint. Specifically, we asked the parties to address the following questions:

> "(1) What is the status of the Third Amended Complaint contained in the record?
>
> "(2) If the Third Amended Complaint in the record remains pending, is the appeal subject to dismissal on the ground that the judgment entered by the trial court on April 13, 2015 is not a final judgment?"

The parties' responses to our questions failed to provide significant clarity, since the parties' views as to what had actually occurred in the trial court were in conflict. Daniel responded to this court's inquiry by stating:

> "To avoid any confusion, at the hearing on the County's motion, Daniel's counsel requested permission to file a Third Amended Complaint specifying the additional enactments discussed by the parties and the trial court in connection with the County's motion. (RT 30-31) The trial court agreed to allow Daniel to file a Third Amended Complaint. (RT 31:14) Daniel's Third Amended Complaint was filed on the following business day, March 2, 2015. (AA921)"

The County, however, explained the relevant procedural background as follows:

> "During oral argument on Respondents' motion for summary judgment, the trial court indicated that Appellant could amend his complaint solely to identify additional enactments supporting a

> mandatory duty claim. (See Reporter's Transcript ('RT') 29:3 - 30:25.) As Appellant states in his opening brief, on March 2, 2015 a proposed Third Amended Complaint was '***presented*** for filing.' (AOB, p. 13, citing 4 AA 921 (italics added).)
>
> "However, the superior court's Register of Actions, a copy of which is contained in the Appellant's Appendix, reflects that on March 4, 2015 the filing was '***rejected***.' (Volume 4, Appellant's Appendix ('4 AA') 945, RA # 127.) The filing, which includes the '[Proposed] Order; Third Amended Complaint; Summons' was returned to Appellant with a 'Notice to Filing Party.' (Supplement to Respondents' Appendix, p.23.) The stated reason for the rejection was that the case had been 'dismissed pursuant to the court's minute order of March 2, 2015 [the order granting summary judgment on the Second Amended Complaint].' (*Ibid.*) [¶] Appellant took no further action (see 4 AA 945-946), and on April 13, 2015, the trial court entered judgment on the operative Second Amended Complaint. (4 AA 902-903.) Because the Third Amended Complaint is not pending, the judgment is final."

The Register of Actions in this case, as well as the court's order on the motion for summary judgment in which the court states that Daniel's newly-cited enactments raised in opposition to the County's motion do not appear in the second amended complaint and that Daniel "has not sought leave to amend," belie Daniel's position on appeal that the third amended complaint was either filed or was approved for filing. Therefore, the operative pleading (and the pleading to which the County's motion for summary judgment was directed) was Daniel's *second amended complaint*.

Nevertheless, Daniel apparently believes that because he raised the issue of these additional duties in his opposition to the motion for summary judgment and at the hearing on the motion for summary judgment (and requested that he be permitted to file a third amended complaint), and because the trial court discussed some of these issues at the hearing in response to Daniel raising these contentions in opposition to summary

judgment and at the hearing, it would be appropriate for this court to consider these new theories on appeal. In fact, both parties in this case have, in several instances, glossed over the fact that the operative pleading for purposes of the summary judgment motion and order is the *second amended complaint*. As a result, both parties have addressed the merits of Daniel's arguments on appeal without acknowledging that the operative pleading does not include any of the alleged "mandatory duties" that have been raised on appeal.

The problem with this approach is that the summary judgment motion resulting in the judgment that is on appeal now was made in response to the operative pleading at the time (and the operative pleading at the time judgment was entered)—i.e., the second amended complaint. The third amended complaint that was presented for filing after the hearing on the summary judgment motion was rejected.[12] As a result, in granting summary judgment, the trial court should not have addressed the new allegations that Daniel raised for the first time in his papers in opposition to the County's motion for summary judgment, and the court's comments at oral argument with respect to these newly referenced enactments were of no legal effect.

What we said earlier in our discussion bears repeating here: For purposes of a summary judgment motion, *the pleadings set the boundaries of the issues to be resolved*. (*Conroy, supra*, 45 Cal.4th at p. 1250.) Not surprisingly, the County's motion for

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12 There is nothing in the record to demonstrate that Daniel took any additional steps in the trial court to rectify the rejection of the third amended complaint or that he requested anything further from the trial court with respect to amending the second amended complaint prior to the entry of judgment in the case.

summary judgment addressed the enactments identified in Daniel's second amended complaint—*not* the enactments that Daniel raised in his opposition to the motion and at the hearing and raises on appeal. The County met its burden as the moving party when it negated the bases of Daniel's claims as identified in the second amended complaint. The County was not required to refute liability on contentions not included in the operative pleading. (See *Conroy,* at p. 1254.) The third amended complaint to which Daniel refers in his briefing on appeal was rejected for filing by the superior court and has no relevance to the issues in this appeal. To the extent that Daniel relies on allegations made in that third amended complaint to support his argument for reversal of the judgment in favor of the County, such reliance is misplaced.

As we have already explained, the second amended complaint did not allege any of the "mandatory duties" that the parties address on appeal. We therefore reject Daniel's contentions on appeal, since they are based on theories not alleged in the operative pleading.[13] Further, he has forfeited any argument with respect to the theories of

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13 Even if Daniel had sufficiently alleged in the operative pleading the purported "mandatory duties" that he raises on appeal, we would nevertheless have to conclude that the vast majority of these allegations could not form the basis of public entity liability.

Specifically, Daniel's contentions regarding the requirements of semi-annual dental and medical examinations, successful unannounced home visits, and efforts to ensure that Daniel attended school are all based on requirements set forth in the *case plan* adopted by the County with respect to Daniel. Because Section 815.6 establishes that public entity liability must be based on a mandatory duty imposed by an " 'enactment,' " Daniel is necessarily contending that a case plan constitutes an " 'enactment' " for purposes of Section 815.6. To support this contention, Daniel asserts that a case plan may be considered an "enactment" because an "enactment" includes any " 'order[] or standard[] having the force of law' adopted pursuant to a legislative enactment." Daniel is apparently suggesting that a court order adopting a case plan renders that case plan an "

'order . . . having the force of law' " sufficient to meet the requirement of an "enactment" under Section 815.6. We disagree with Daniel's analysis.

Again, the term " '[e]nactment' " as used in Government Code section 815.6 has been specifically defined to mean "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.) The definition provided in Government Code section 810.6 " 'is intended to refer to *all measures of a formal legislative or quasi-legislative nature*.' " (*Wilson, supra,* 91 Cal.App.4th at p. 982, italics added.) The term "regulation," as used in Government Code section 810.6, has been further defined, in relevant part, to mean "a rule, regulation, order or standard, having the force of law, adopted . . . as a regulation by an agency of the state pursuant to the Administrative Procedure Act [Act]." (Gov. Code, § 811.6.) Thus, this is the provision on which Daniel relies in claiming that a court order may be an "enactment" for purposes of Section 815.6. However, Government Code section 811.6 demonstrates that the term "order" does not refer to a *court* order but, rather, to an order of a *state agency*. We have found no authority to support a reading that that the term "order," as used to give meaning to the term "regulation" in Government Code section 810.6, was intended to refer to an order of a court.

We also reject Daniel's comparison of a case plan to "police department guidelines governing the use of firearms" at issue in *Peterson v. Long Beach* (1979) 24 Cal.3d 238; Rules of the State Bar, as promulgated by the Judicial Counsel pursuant to Business and Professions Code section 6047 at issue in *Engel v. McCloskey* (1979) 92 Cal.App.3d 870; and a "General Order of the Public Utilities Commission" at issue in *Elson v. Public Utilities Commission* (1975) 51 Cal.App.3d 577. According to Daniel, because the Welfare and Institutions Code and the regulations require the County to create and adopt a case plan for all dependent children, the case plan for any particular child may be considered an "enactment" for purposes of Section 815.6, just as the rules or standards at issue in *Peterson*, *Engel* and *Elson* were considered "enactments" that imposed mandatory duties on the public entity involved. Daniel fails to acknowledge, however, that *Peterson*, *Engel* and *Elson*, all involved rules of general application. In contrast, a case plan involves an individual set of guidelines created to address a specific child or specific family's situation and needs. Further, the creation of a case plan also does not involve the type of rulemaking process involved in the creation of the generalized standards referenced in *Peterson*, *Engel*, and *Elson*; a case plan certainly cannot be thought of as originating from a legislative or quasi-legislative process (see *Wilson*, *supra,* 91 Cal.App.4th at p. 982 [" 'enactment' " means to refer to "measures of a formal legislative or quasi-legislative nature"]). Consequently, there is no authority supporting the position that a case plan constitutes an "enactment" for purposes of Section 815.6, and that therefore the requirements for a particular child's care that are envisioned in a case plan create mandatory duties for which liability may be imposed.

Therefore, to the extent that Daniel's newly-raised allegations of mandatory duties imposed on the County are based *on requirements set forth in Daniel's case plan*, those allegations could not support liability against the County.

liability that were actually alleged in the second amended complaint by failing to present any argument as to why summary judgment should not have been granted with respect to the enactments identified as the basis for the claims set forth in the second amended complaint.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.